FILE COPY

Office Supreme Court, U
FILED
OCT 25 193
CHARLES ELMORE CR
CL

Nos. 15, 106, 84, 86.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

BURNS POE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON,
v.
H. G. SEABORN.

FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE,
v.
I. B. KOCH.

ON CERTIFICATES FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

GEO. C. HOPKINS, COLLECTOR OF INTERNAL REVENUE,
Petitioner,
v.
C. W. BACON.

JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE,
Petitioner,
v.
WILLIAM PFAFF.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM REGARDING THE LEGISLATIVE HISTORY OF THE REVENUE ACT OF 1926.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

Nos. 15, 106, 84, 86.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

BURNS POE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON,

v.

H. G. SEABORN.

FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE,

v.

I. B. KOCH.

ON CERTIFICATES FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

GEO. C. HOPKINS, COLLECTOR OF INTERNAL REVENUE,
Petitioner,

v.

C. W. BACON.

JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE,
Petitioner,

v.

WILLIAM PFAFF.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM REGARDING THE LEGISLATIVE HISTORY OF THE REVENUE ACT OF 1926.

I.

The revenue bill of 1926 was introduced in the House December 7, 1925.

Secs. 210-211 were identical with corresponding sections in all earlier revenue acts beginning with the Revenue Act of 1916 (including the Revenue Acts of 1921 and 1924, to which references are made in taxpayers' briefs).

The taxing language used in these sections had acquired, prior to 1926, a definite meaning opposed to the contentions of the Government in these cases. The incorporation of such language in the 1926 Act imported also into that act such construed meaning.

The taxing language used thereby definitely expressed the intent of Congress, in accordance with the repeated opinions of Attorneys General and Treasury Regulations five years old and still in effect, that in California and jurisdictions having similar laws the individual intended to be taxed on community income was the husband, since the wife had no real ownership interest therein; but that in the other community property states where the wife did have a real ownership interest in such income the husband was not taxable upon her said interest even though he had the powers of management, control and dominion, so called. The showing is affirmative that Congress had twice refused, notwithstanding official pressure, to change the law so as to tax the husband because of his control and administration for income the wife owned. No plainer showing of actual Congressional intent can be found. It is conclusive in this case unless the subsequent decision in the *Robbins* case as suggested by the government in argument compels this court to say that Congress must be presumed, notwithstanding its actual contrary intent, to have finally passed the bill purposing it to mean that in all cases the husband must

be taxed for the entire community income on some other theory.

The bill contained also Secs. 216 and 223, which dealt with exemptions of, and deductions by, married persons and with separate, joint and individual returns by the spouses. They appear in all revenue acts since the Revenue Act of 1918.

II.

The bill was referred to the Ways and Means Committee of the House and was reported back to the House by that Committee on December 7, 1925.

Secs. 210, 211, 216 and 223 were unchanged.

III.

The bill passed the House December 18, 1925.

No change was made or attempted to be made in Secs. 210, 211, 216 or 223.

IV.

The bill having reached the Senate was referred to its Finance Committee on December 21, 1925. It was reported back to the Senate by the Finance Committee on January 20, 1926, and the report printed under date of January 22, 1926.

Secs. 210, 211, 216 and 223 were unchanged.

V.

On February 12, 1926, while the bill was pending in the Senate, a retroactive amendment to it was offered by Senator Jones of Washington (one of the community property states whose laws are under examination in this case), and was adopted by the Senate, reading as follows:

"RETROACTIVE REGULATIONS"

"SEC. 1213. The liability of any taxpayer under any internal revenue law shall be determined (unless such taxpayer otherwise consents or requests) in accordance with the Treasury decisions, opinions of the Attorney General, and regulations made by the commissioner or the Secretary, or by the commissioner with the approval of the Secretary, in force at the time his return was made, whether such return was made before or after the enactment of this act. As used in this subdivision the term 'return' means, in the case of a return which has been amended, the return as finally amended."

VI.

On the same day (February 12, 1926) the bill was passed by the Senate.

Secs. 210, 211, 216 and 223 remained unchanged.

VII.

The House did not concur in the Senate changes and the bill was sent to joint conference on February 15, 1926.

VIII.

In joint conference, the language of the retroactive Jones amendment (Sec. 1213) was considered by the Treasury Department to be uncertainly broad and, at its suggestion, retroactive Secs. 1207 (invested capital), 1208 (installment sales), and 1212 (community property), formulated by it, were substituted. Sec. 1212 read as follows:

"SEC. 1212. Income for any period before January 1, 1925, of a marital community in the

income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the State law applicable to such marital community for such period. Any spouse who elected so to return such income shall not be entitled to any credit or refund on the ground that such income should have been returned by the other spouse."

IX.

The report of the joint conference committee was called up in the House and the bill finally passed in the House on February 23, 1926, and in the Senate on February 24, 1926.

Secs. 210, 211, 216 and 223 remained unchanged.

X.

The act was approved and became a law on February 26, 1926.

Thus the sections of the Revenue Act of 1926, which contain all of the taxing language relied on by the Government in this case, remained unchanged throughout the legislative progress of the Act.

The revenue act in question was divided into twelve separate major divisions or titles. Title II dealt with the imposition of the income tax for the year 1925 and subsequent years. That title was a complete taxing act in itself. Secs. 210, 211, 216 and 223 are embodied in that title.

Sec. 1212 of the act was not a part of Title II. It was a part of Title XII, the final title of the act. In Title XII were contained various special administrative provisions which dealt principally, if not exclusively, with situations arising in prior years under

former revenue acts. In the main its sections threw no light upon the taxing provisions of Title II of the Act.

In the briefs of the Government (see e. g.—No. 15, Burns Poe, Collector, v. H. G. Seaborn (page 9 footnote)), the understanding of all parties to this litigation as to Sec. 1212 of the revenue act and the position of the Government in this litigation, with reference to that section, are thus stated by the Solicitor General:

> "This procedure" (the practice of divided returns in the community states of Washington, Texas, Louisiana, Arizona, Nevada, Idaho and New Mexico—the parenthesis is ours) "was subsequently given retroactive legislative approval as to 1925 and prior years by Sec. 1212 of the Revenue Act of 1926, *infra*, p. 46. That section was not intended to apply to taxes for subsequent years and *has no bearing on the question here involved.*" (Italics ours.)

and, in the brief of Solicitor General Mitchell, in *Zemurray v. United States,* 278 U. S. 600, filed in this court in opposition to an application for writ of certiorari (in which brief the Solicitor General took the position that no question of community income was involved, but only a question of compromise), Sec. 1212 was characterized "as evidencing the intention of Congress to accept and confirm the returns of community income made in community property states other than California, for periods prior to January 1, 1925" * * * and, "as having left open for determination in the courts the question of the right of the wife in each of these states to make separate return." Also, in his opinion to the Trea-

sury, of date July 16, 1927, Mr. Mitchell referred to Sec. 1212 as "in the nature of a statute of limitations".

XI.

The decision in *United States v. Robbins*, 269 U. S. 315, was handed down January 4, 1926.

XII.

Representative Green's verbal statement, perhaps not binding on any one, made when reporting the Revenue Act of 1926 to the House on behalf of the joint conference committee, declared that the various retroactive provisions in the 1926 Act (Secs. 1207, 1209, 1212, and possibly others) were included in the Act for the purpose of

> "closing up those cases on the basis of the settlement made by the taxpayer and in accordance with the rules under which the Treasury Department had been acting,—rules and regulations which the House itself had practically sanctioned, because it attempted to make no change in them believing them to be valid, to be enforcible and, on the whole, * * * to be the best one that could be enacted."

XIII.

The Treasury Department obviously believed that the decision in the *Robbins* case was applicable exclusively to California, and that it was consistent with its own previous regulations, which distinguished between tax incidence in California and in the other states because the Treasury Department made no changes in such regulations for many

months after the Robbins decision and the passage of the Act of 1926. It has continued to the present date its practice of distinguishing between California incomes and community incomes in the other community states.

XIV.

Acting Attorney General Mitchell, seventeen months after the Robbins decision, officially advised the Treasury Department that, in his opinion, the *Robbins* decision was based upon the California wife's want of "ownership" of so-called community income in that State. He intimated that it introduced no new taxing principle resting on some basis other than ownership. He advised test suits and declared that, in his opinion, the test suits would depend upon "ownership" of the questioned income under applicable local laws, and that such questions must be determined by local laws.

XV.

It is not likely that Congress, in the closing and hurried hours of completing such important legislation as the 1926 Revenue Act, which had been long pending before it, considered that the *Robbins* decision (which was rendered after the Revenue Act had taken a fixed form consistent with pre-existing and definitely construed revenue legislation), had the effect of introducing into the act an entirely new tax principle, and yet made no effort to adjust the act to the new principle. Especially is this true where it is now affirmatively shown that a most distinguished law officer of the government, after months

of study of the Revenue Act of 1926 and the effect of the *Robbins* case, apparently never conceived the decision to have such a revolutionary effect and when a great department of the government filled with experts in tax administration, evidently did not understand the *Robbins* case as having such an effect because the Treasury Department itself did not withdraw the opinions and regulations announcing a construction contrary to the government's contention in these cases but continued them in full effect and operation until long after the decision in the *Robbins* case and the passage of the Act of 1926 and, in fact, withdrew the opinions and regulations only at the time the present test cases were decided upon. It is no answer to say that Sec. 1212 was added, for Sec. 1212 had no prospective application. The attitudes of the law officer of the Government and its tax department were not casual or unofficial, but were evidenced by official opinions, the continuation of existing regulations, innumerable rulings, etc.

XVI.

Such considerations foreclose the contention of the Government, made for the first time in these test cases, that solely because of the Robbins decision, Congress intended the 1926 Act to tax incomes in community states upon some theory of so-called "dominion", or "control", or "exclusive enjoyment", or "unfettered command" or any other theory than that of ownership (even if any such theory, distinct from ownership, could be maintained and applied to

the situations presented in the records in these cases before this court).

Respectfully submitted,

RHODES S. BAKER,
GEORGE DONWORTH,
CHARLES E. DUNBAR, JR.,
R. C. FULBRIGHT,
PALMER HUTCHESON,
MONTE M. LEMANN,
CLIFTON MATHEWS,
BLAINE B. SHIMMEL,
HARRY C. WEEKS,

October 25, 1930.